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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91164280
Party	Plaintiff REGAL WARE, INC ,
Correspondence Address	JOSEPH A. KROMGOLZ RYAN KROMHOLZ & MANION, S.C. P.O. BOX 26618 MILWAUKEE, WI 53226
Submission	Opposer's Brief in Opposition of Applicant's Motion to Compel
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Signature	/Joseph A. Kromholz/
Date	09/07/2005
Attachments	050907 opposition to motion to compel.pdf (8 pages) Exhibit 1 to Opposition to Motion to Compel.pdf (1 page) exhibit 2 to Opposition to motion to compel.pdf (1 page) Exhibit 3 to Opposition to Motion to Compel.pdf (2 pages) 050907 Certificate of Service for Opp to Mtn to Compel.pdf (1 page)

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Regal Ware, Inc. **Opposer** **v.** **Advanced Marketing Int'l, Inc.** **Applicant**	Opposition No.:91164280 Atty. Docket No. :9513.18067-LIT

OPPOSER'S BRIEF IN OPPOSITION OF APPLICANT'S MOTION TO COMPEL

Regal Ware, Inc. (Opposer), by its attorneys, Ryan Kromholz & Manion, S.C. by Joseph A. Kromholz, and Daniel R. Johnson, hereby respond to Advanced Marketing Int'l, Inc.'s ("Applicant") motion to compel:

I. The Present Motion Is Incongruous, Untimely, and Completely Lacking Any Reasonable Good Faith Basis. Applicant's Motion Must Be Denied And Applicant Must Be Instructed To Actually Enter Into A Good Faith Discussion With Opposer.

a. Factual Background

On 28 April 2005 Opposer responded to Applicant's discovery requests. The responses to discovery requests will be discussed in greater detail below but it should be noted that Opposer put Applicant on notice, with respect to certain of its responses, that it would provide the requested information once the parties had agreed to an appropriate protective order.

On 28 April 2005 Opposer filed an amended Notice of Opposition. This was entered by the

Board in an Order dated 8 June 12005. That same Order reset the time discovery was to close from 11 September 2005 to 8 November 2005.

On 6 July 2005 Applicant answered Opposer's amended Notice of Opposition, thereby proving, *inter alia*, that it must have at least read part of the Board's 8 June 2005 Order.[1]

Subsequently, Opposer received no communications from Applicant regarding Opposer's discovery responses until 12 August 2005, nearly 120 days later.

On 21 July 2005 Opposer noticed two depositions of Applicant for 18 August 2005 and 19 August 2005. Applicant did not, at first, respond to Opposer's inquiries regarding the dates of these depositions. See Exhibit 1. Eventually, Applicant did respond to Opposer's requests and the parties began to work toward scheduling these depositions.

Almost immediately thereafter, Applicant, without any phone call, sent its letter dated 12 August 2005.[2] No draft of any protective order was attached to this letter. A draft Protective Order did arrive via email in the afternoon of 15 August 2005.

On 16 August 2005, in a letter, Opposer told Applicant "You have had our discovery responses since April, and this is the first that we have heard of your objections to our responses. It is unreasonable for AMI to make this tardy complaint and expect supplemented responses within less than one week. We will address your complaints, as well as reviewing the Protective Order, in due course." [3] See Exhibit 2.

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[1] Applicant's present motion to extend discovery dates, from September to November, would seem to indicate that it did not understand the Board's 8 June 2005 Order which already has so extended the close of discovery.

[2] This letter also addressed Applicant's desire to extend the period of discovery sixty (60) days, which Opposer took to mean, in view of the plain language of the Board's 8 June 2005 order, to be a request to move the close of discovery to 9 January 2006. However, as noted in footnote 1, supra, Applicant was under the misapprehension that discovery was to close on 11 September 2005.

[3] It should be noted that while Opposer did not give a specific date that the very definition of the phrase "due course" is a "reasonable period of time". Further, it is Applicant's representations in its brief to the effect that Opposer has refused to discuss the protective order with it (see, e.g., page 7 of Applicant's brief) are just simply disingenuous, as the correspondence record clearly demonstrates.

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On 17 August 2005, Applicant responded with a letter (received by Opposer's counsel at 4:06 p.m.) that ignored the substance of Opposer's 16 August 2005 letter and substantively said Applicant would proceed with its motion to compel, "unless the deficiencies addressed in our August 12, 2005 letter are appropriately remedied by Friday, August 19, 2005. See Exhibit 3 (attached hereto, as it was omitted from Applicant's motion to compel).[4] This effectively gave Opposer's counsel one (1) day to (a) review the protective order; (b) address the merit, if any, of the issues raised in Applicant's 12 August 2005; and (c) consult with their client.

b. The Applicant's Motion Clearly Is Not Based Upon Any Good Faith Attempt To Resolve Any Discovery Dispute Between The Parties.

There was no "good faith . . . attempt[] to confer with the party not making the disclosure in an effort to secure the disclosure without court action." Fed. R. Civ. P. 37(a)(2)(A). In Cannon v. Cherry Hill Toyota, 190 F.R.D. 147 (D. N.J. 1999), the Court held that sending a fax and demanding a response by the next business day and threatening to file a motion to compel is a token effort rather than a sincere effort. Id. at 153.

In the present case, Opposer specifically told Applicant that it would review its complaints and the proposed protective order[5] in due course, i.e., a reasonable period of time. Applicant simply ignored this response and demanded immediate agreement to its terms by the next business day. This is precisely the definition of a token effort.

The Applicant's motion is not made in good faith. Applicant did nothing for nearly four (4) months and then essentially demanded immediate action from Opposer. There is zero equity in the Applicant's position. All Opposer wanted was a reasonable time frame in which to address the

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[4] Opposer's response to this letter is attached as Exhibit 3 to Applicant's motion to compel. Further, it is apparent, given the time frame involved, that Applicant had in fact already written its motion.

[5] The proposed protective order itself is a document of 12 pages in length with important provisions that Opposer's Counsel surely should at least be allowed to discuss with his client.

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detailed issues that were presented by the Applicant.

The Applicant's motion must be dismissed because the evidence demonstrates that it was not made in good faith.

c. Applicant's Motion Is Made Over 120 Days After Opposer Responded. Applicant's Motion Is Simply Not Timely And May Be Dismissed On This Ground As Well.

Although Fed. R. Civ. P. 37 does not specify any time limit within which a Motion to Compel must be brought, courts have made it clear that a party seeking to compel discovery must do so in timely fashion. Buttler v. Benson, 193 F.R.D. 664, 666 (D. Colo. 2000) ("A party cannot ignore available discovery remedies for months") Once, as here, a party registers a timely objection to requested production, the initiative rests with the party seeking production to move for an order compelling it. Clinchfield R. Co. v. Lynch, 700 F.2d 126, 132 n. 10 (4th Cir. 1983). Failure to pursue a discovery remedy in timely fashion may constitute a waiver of discovery violations. DesRosiers v. Moran, 949 F.2d 15, 22 n.8 (1st Cir. 1991).

We cannot know why Applicant delayed nearly 120 days to bring this motion but, in any event, the extensive delay coupled with Applicant's complete lack of good faith clearly are circumstances that require denial of Applicant's motion.

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d. Opposer Is Willing To Discuss And Confer With Applicant Regarding Its Discovery Responses. Nevertheless, Applicant's Position With Respect To Opposer's Discovery Responses Is Simply So Incongruous As To Require Immediate Denial Of Applicant's Motion To Compel.

i. Applicant's Objections To Opposer's Responses To Its Requests For Admission Profoundly Miscomprehend The Requirements Of Federal Of Civil Procedure 36.

Applicant asserts that Opposer has "failed to make appropriate responses to [Applicant's] third, fourth, and sixth requests for admissions." Applicant's brief at page 2. This is simply absurd. As Applicant notes but does not comprehend, Rule 36 does state that "an answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made a reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny." Reference to Opposer's responses clearly demonstrates that the Opposer denied Applicant's requests for admission 3, 4, and 6.

Opposer, as Applicant notes, specifically stated: "Opposer can find no evidence to support this statement and therefore Denies the request." How this can be interpreted as anything other than a denial is simply unbelievable.

Opposer's responses to Applicant's requests for admission are appropriate. Applicant's motion must be denied.

ii. Applicant's Positions With Respect To Opposer's Interrogatory Responses Are Without Merit, Premature, And Simply Could Have Been Avoided Had Applicant Acted With Even A Modicum Of Good Faith.

Applicant complains of Opposer's responses to Interrogatories 2, 3, 5, 7, 8, 9, 11, and 22.

Specifically, with respect to Interrogatories 3, 5, 7, 8, 9, and 11 Opposer has clearly told

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Applicant that it would provide any representative documents that it had. All Opposer has requested is that a protective order be in place. This request, as noted above, was made back in April of 2005. The protective order provided by Applicant on 15 August 2005 was essentially done so on a take or leave it basis, as Applicant's actions have amply demonstrated. All Opposer is requesting is a reasonable period of time to substantively review the proposed protective order and to discuss the ramifications of the protective order with its client. See, e.g., Exhibit 2.

Opposer maintains that it will have no problem producing any responsive documents once a protective order is in place. Applicant's indolence of nearly 120 days has led to a delay. Applicant's motion has further delayed Opposer's ability to review the protective order that Applicant has proposed. The Applicant's motion should be denied and Applicant should be directed to actually confer with Opposer so that this matter can be promptly resolved.

With respect to its response to Interrogatory No. 2, Opposer did not know at the time the response was made that Applicant would be so lethargic. Opposer had reasonably expected that a protective order would be worked out in a reasonable period of time and that the parties would then exchange documents that would sufficiently and accurately supplement this response. Opposer believes that its response was sufficient but it is willing to expand upon that response in the context of resolving all issues related to the handling of documents both confidential and non-confidential.

With respect to Interrogatories 7, 9, and 22, these interrogatories clearly require the disclosure of highly confidential information. Opposer maintains its objection to providing confidential information until the protective order issue has been appropriately resolved; once that has been done Opposer will provide relevant information to the extent that it has such information. There is simply no reasonable basis to support Applicant's contention that Opposer's reasonable objection to the production of confidential information absent a protective order being in place is allegedly frivolous. Orders that protect, *inter alia*, confidential business information are specifically authorized by Fed. R. Civ. P. 26(c)(7).

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Again if Applicant had simply entered into a good faith discussion with the Opposer all of these matters could have been rendered moot and the Board would not have to be burdened by Applicant's motion.

Again, Applicant's motion must be dismissed.

iii. Applicant's Position With Respect To Opposer's Responses To Its Requests For Production Of Documents Is Likewise Without Merit.

Again, all of the issues raised by Applicant resolve back into an appropriate protective order being entered and the Applicant actually engaging in a good faith discussion with the Opposer. The Opposer stands by each and every objection that it has made. The Opposer clearly has provided responsive documents and has informed the Applicant that it will withhold confidential documents until the protective order issue is resolved, which Opposer has said it will do in a reasonable amount of time. Opposer has refused to produce documents subject to the attorney-client privilege and has made the appropriate objection to that effect. Opposer has not produced a privilege log but clearly that can be done when the protective order issues are resolved. See, e.g., Strougo v. Bea Associates 199 F.R.D. 515, 521 (SDNY 2001) (Privilege log can be provided at either the time the responses are made or at a mutually agreeable time).

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II. Conclusion

Applicant's motion must be dismissed and Applicant instructed to actually enter into a good faith discussion with the Opposer.

Respectfully submitted:

Date: September 7, 2005

Ryan, Kromholz & Manion, S.C.

By: /Joseph A. Kromholz/

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21 July 2005

Lori T. Milvain, Esq.
Gronek & Latham, LLP
390 North Orange Avenue
Suite 600
Orlando, FL 32801

VIA FACSIMILE AND FEDERAL EXPRESS

Re: Opposition No. 91164280

Dear Ms. Milvain:

Since we have not heard from you as to objections to the Depositions scheduled for 18 August 2005 and 19 August 2005, we are making the necessary arrangements for the taking of these depositions.

Sincerely,
RYAN KROMHOLZ & MANION, S.C.

By: Joseph A. Kromholz

JAK/pjp

CC: Regal Ware, Inc.

EXHIBIT 1

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August 16, 2005

VIA FACSIMILE AND US MAIL

Michael J. Furbush, Esq.
Gronek & Latham, LLP
390 North Orange Avenue
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Re: Opposition No. 91164280

Dear Mr. Furbush:

We respond to your August 12, 2005 letter. You have had our discovery responses since April, and this is the first that we have heard of your objections to our responses. It is unreasonable for AMI to make this tardy complaint and expect supplemented responses within less than one week. We will address your complaints, as well as reviewing the Protective Order, in due course.

Sincerely,
RYAN KROMHOLZ & MANION, S.C.

By:
Joseph A. Kromholz

JAK/pjp
CC: Regal Ware, Inc.

EXHIBIT 2

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August 17, 2005

VIA FACSIMILE (262) 783-1211 AND U.S. MAIL

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Ryan Kromholz & Manion, S.C.
P.O. Box 26618
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Re: *Opposition No. 91164280 filed on behalf of Regal Ware, Inc. against Advanced Marketing Int'l., Inc.*

Dear Mr. Johnson:

This letter follows Lori Milvain's letter of August 12, 2005, regarding discovery.

As set forth in our previous letter, we have attempted to contact you several times in order to discuss deposition scheduling and the status of discovery in general. To date, we have received no response.

The purpose of this letter is to make a good faith effort, pursuant to Section 523.02(1) of the TTAB Manual, to discuss our intent to file a motion for extension for a 60 day extension of the discovery period in this matter.

Please contact me at your earliest convenience to discuss the issues outlined in this letter, and to advise whether you agree to our proposed extension of the discovery period. If we do not hear back from you by noon EST on Friday, August 19, 2005, we will move unilaterally for an extension.

EXHIBIT
3

We are also in receipt of your August 16, 2005 letter responding to Michael Furbush's August 12, 2005 letter pertaining to deficiencies in Regal Ware's responses to discovery. We do not believe that your response, indicating that you will review the discovery at issue and the proposed confidentiality agreement "in due course," is appropriate. Accordingly, we will proceed with our planned motion to compel unless the deficiencies addressed in our August 12, 2005 letter are appropriately remedied by Friday, August 19, 2005.

Very truly yours,

Scott D. Danahy

cc: Advanced Marketing Int'l. Inc.
Lori Milvain, Esq.
Michael J. Furbush, Esq.

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Regal Ware, Inc. Opposer v. Advanced Marketing Int'l, Inc. Applicant	)	Opposition No.:91164280 Atty. Docket No. :9513.18067-LIT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Opposer's Brief in Opposition of Applicant Motion to Compel has been serviced on the following attorney of record by Federal Express Addressed as follows:

Lori T. Milvain, Esq.
Gronek & Latham, LLP
390 North Orange Avenue
Suite 600
Orlando, Florida 32801

this 7th day of August 2005.

/Peggy Pechulis/
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